IN THE

Supreme Court of the United States

October Term, 1971.

No. 70-153.

UNITED STATES OF AMERICA,
Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION and HONORABLE DAMON J. KEITH,
Respondents.

On Certiorari From the United States Court of Appeals for the Sixth Circuit.

BRIEF OF AMERICAN FRIENDS SERVICE COMMITTEE AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS' POSITION.

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INTEREST OF *AMICUS*.

The American Friends Service Committee, Incorporated, established in 1917 and subsequently incorporated under the laws of the State of Delaware, engages in religious, charitable, social, philanthropic and relief work in the United States and in foreign countries on behalf of the several branches and divisions of the Religious Society of Friends (Quakers) in America.

Created as a working expression of the Quaker testimony against war and for universal justice and human brotherhood, the American Friends Service Committee has sought not only to relieve suffering but to move affirmatively against the underlying causes of violence, injustice and prejudice.

The promotion of equal employment opportunities for racial minorities has for many years been a major program direction of the *amicus*. One such program was in operation 10 years ago in Baton Rouge, Louisiana.

In February of 1961 the director of that program, Wade Mackie, received reports that his office telephone was being tapped. The F. B. I. and Southern Bell Telephone Company joined in an investigation, which revealed that Mackie's office and home telephones were both being tapped. The home tap went into the garage of Jack N. Rogers, then head of the Louisiana Un-American Activity Committee.

Following that investigation a Federal Grand Jury in New Orleans began hearings directed to discovering the source and purpose of the wiretapping. The Grand Jury heard testimony that the primary use of the tapped calls was to tape them and then to play them back before audiences of church laymen in an effort to force the ouster from their pulpits of 53 Baton Rouge ministers who had earlier signed an "Affirmation of Religious Principles." The "Affirmation" declared that "discrimination on the basis of race is a violation of the Divine Law of Love."

At least fifteen religious leaders were said to have been victims of the wiretapping. Three of them, Wade Mackie, Rabbi Marvin Reznikov, and Reverend Irvin Cheney testified before the Grand Jury.

After discovery that his conversations were being wiretapped, Reverend Cheney, pastor of the Broadmoor Baptist Church, resigned from his pastorate "for the good of the church and for my family". He refused any further com-

munication with Mackie, and withdrew his support from the American Friends Service Committee's program.

After the Jury recessed, a Baton Rouge Minister declared anonymously in an interview in the *State Times:*

> "These telephone conversations were not tapped to get information on any subversive or integrationist activities . . . (they) were recorded to use as a wedge against the signers of the 'Affirmation', to take these recordings to key members of our congregations and stir up trouble against us. The two chief targets were Mackie and Reznikov because the admitted strategy was to link us with a man who works with Negroes and with a Jew, in order to stir up all the latent hatred of anti-semitism [sic] which you can find in small minority in any church congregations."

Besides outlining what he knew about the tapping and recording of telephone calls, the clergyman described obscene phone calls and mail, threats to his life, withdrawal of financial support for his church, and actions against church members who stood by him.

Speaking for the Louisiana Un-American Activity Committee, Jack N. Rogers said of the Committee's investigations:

> "Every subversive organization in the southern United States uses one side or the other of the racial issue as a protective coloring for its activities . . . The Committee investigates subversive activities, nothing more."

Amicus is deeply concerned about electronic surveillance by government of individuals and associations not only for the broader reasons hereinafter set forth, but also because of its experience in Baton Rouge. That experience

taught two lessons. First, the power of wiretapping to damage or destroy programs for human betterment undertaken in utmost good faith and under religious conviction is enormous. Second, government's most facile justification for such surveillance is to talk about the dangers of subversion. For *amicus* there is something frighteningly familiar about the Affidavit of Attorney General Mitchell in this case that wiretaps are necessary to "protect the nation from attempts of domestic organizations to attack and subvert the existing structure of government." *United States v. United States District Court*, No. 71-1105 (6th Cir. April 8, 1971) at p. 12.

THE CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The First Amendment to the Constitution of the United States:

> Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble and to petition the Government for a redress of grievances.

The Fourth Amendment to the Constitution of the United States:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

18 United States Code § 2511(3):

> Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1143; 47 U. S. C. 605) shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the over-

throw of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. The contents of any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial, hearing, or other proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power.

ARGUMENT.

Introduction.

The government argues that in cases involving national security, Section 2511(3) of the Omnibus Crime Control and Safe Streets Act of 1968 reserves the power to the President or to the Attorney General as his delegate to authorize electronic eavesdropping without prior judicial determination of probable cause and particularity. If this national security eavesdropping is reasonable, then its fruits may be used in any ensuing "trial, hearing, or other proceeding". The term reasonable is ambiguous. Must the President's or his delegate's initial fear of a threat to the national security be reasonable, or must the use of the eavesdropping be reasonable, or both? The section, moreover, does not indicate whether reasonableness is a question of law or fact.

The danger inherent in such a broad interpretation of the power as the government requests, exempt from the Fourth Amendment's requirement of prior judicial determination, is that the government may use this power to silence persons or groups feared only because they advocate unpopular ideas.[1]

This Court has explicitly recognized that freedom of association is guaranteed by the First Amendment.

> Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this court has . . . recognized by remarking upon the close nexus between freedom of speech and assembly . . . Of course, it is immaterial whether the beliefs sought

1. This argument is largely indebted for structure and content to Note, "Eavesdropping at the Government's Discretion—First Amendment Implications of the National Security Eavesdropping Power", 56 Cornell L. Rev. 161 (Nov. 1970).

> to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny. *NAACP v. Alabama ex rel. Patterson*, 357 U. S. 449, 460-61 (1958).

Electronic eavesdropping of associations without the prior judicial review guaranteed by the Fourth Amendment abrogates the privacy which this Court has said is essential to freedom of association. "Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." *NAACP v. Alabama ex rel. Patterson, supra*, at 462. If Section 2511(3) is upheld, as the government reads it, then freedom of association will be impaired in contravention of the First Amendment.[2]

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2. This Court has recognized that the unrestricted use of investigation and police power has a destructive effect upon the exercise of fundamental freedoms. *Cramp v. Board of Pub. Instr.*, 368 U. S. 278, 283 (1961); *Sweezy v. New Hampshire*, 354 U. S. 234, 250-51 (1957). This Court has also found infringement of the First Amendment right of association in various forms of state and federal action. *United States v. Robel*, 389 U. S. 258 (1967) (denial to Communist Party member of employment at defense facility); *Keyishian v. Board of Regents*, 385 U. S. 589 (1967) (requirement of loyalty oath for teachers); *Elfbrandt v. Russel*, 384 U. S. 11 (1966) (public employee loyalty oath requirements); *Aptheker v. Secretary of State*, 378 U. S. 500 (1964) (travel restrictions on Communist Party members); *Baggett v. Bullitt*, 377 U. S. 360 (1964) (teacher oath); *NAACP v. Alabama ex rel. Flowers*, 377 U. S. 288 (1964) (ouster of organization from the states); *Brotherhood of R. R. Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U. S. 1 (1964) (proscription of cooperative legal activities); *NAACP v. Button*, 371 U. S. 415 (1963) (same); *Louisiana ex rel. Gremillion v. NAACP*, 366 U. S. 293 (1961) (forced disclosure of membership lists); *Shelton v. Tucker*, 364 U. S. 479 (1960) (teacher oath); *Bates v. Little Rock*, 361 U. S. 516 (1960) (forced disclosure of membership lists); *NAACP v. Alabama ex rel. Patterson*, 357 U. S. 449 (1958) (same).

The Court of Appeals' holding in the present case demonstrates that Section 2511(3) is subject to attack on Fourth Amendment grounds alone. A Fourth Amendment attack, however, is not necessarily available to all members of an association. This Court has held that Fourth Amendment rights are personal and may not be vicariously asserted. Therefore, one affected by an eavesdrop cannot assert a Fourth Amendment violation if he was not directly subjected to eavesdropping. *Alderman v. United States,* 384 U. S. 165, 174 (1969). It is for this reason and in light of its particular interest in this case that the *amicus* presents a First Amendment attack on Section 2511(3).

I. The Government's Potential Eavesdropping Power Under Section 2511(3) Will Have a Deterrent Effect on Freedom of Association.

When the police power of government is exercised pursuant to vague or overbroad legislation, so that citizens are in doubt as to what activity is unlawful or otherwise subject to unfavorable official action, those citizens may be deterred from pursuing legal or even constitutionally protected activities. When a vague or overbroad statute deters the exercise of First Amendment rights, it is said to have a "chilling effect" on those rights. *Dombrowski v. Pfister,* 380 U. S. 479, 483-90 (1965).

More than thirty years ago this Court observed that the evils to be prevented by the First Amendment "were not the censorship of press merely, but any action of the government by means of which it might prevent . . . free and general discussion of public matters . . . ." *Grosjean v. American Press Co.,* 297 U. S. 233, 249-250 (1936). The philosophical objection to electronic eavesdropping in the name of the "national security" is that it has the hallmarks

of a police state with the government maintaining a record of the political ideas and activities of the populace. The constitutional objection is that it puts a burden on the exercise of First Amendment rights which at least arguably has an "inhibiting effect in [sic] the flow of democratic expression and controversy upon those directly affected and those touched more subtly." *Sweezy v. New Hampshire,* 354 U. S. 234, 248 (1967). Recognition of this inhibition is not limited to cases in which court sanctions are imposed. "Inhibition as well as prohibition against the exercise of precious First Amendment rights is a power denied to government." *Lamont v. Postmaster General,* 381 U. S. 301, 309 (1965) (Brennan J., concurring). People who are merely identified with views that are "unorthodox, unpopular, or even hateful to the general public" suffer injury recognizable under the First Amendment. *Watkins v. United States,* 354 U. S. 178, 197 (1957).

Thus freedom of association is particularly vulnerable to chilling. Unless government power to eavesdrop in Section 2511(3) national security cases is restrained by narrowly drawn legislation which implements Fourth Amendment safeguards, the slightest unfavorable attention from the government toward an unpopular group will arouse in its membership a fear of eavesdropping. Eavesdropping under Section 2511(3) occurs without notice. Hence, the chill does not result from the eavesdropping itself, but from the fear that it will occur. This fear that the privacy of association will be destroyed may activate the harmful effects of chilling.

Formerly, when confronted by an exercise of police power which conflicted with freedom of association, the Supreme Court resolved the conflict by "balancing" the respective interests. *E.g., NAACP v. Alabama ex rel. Patterson,* 357 U. S. 449, 461 (1958); *American Communications Association v. Douds,* 339 U. S. 382, 393-404 (1950);

Communist Party of the United States v. Subversive Activities Control Bd., 367 U. S. 1, 88-105 (1961). If a statute was vague or overbroad, the court "rewrote" it in order to conform to the First Amendment. *American Communications Association v. Douds*, 339 U. S. 382, 393 (1950). In *United States v. Robel*, 389 U. S. 258, 264-68 (1957), however, the Court indicated that when a statute is not drawn with sufficient precision to avoid imposing a "substantial burden" on freedom of association, balancing legitimate national security interests against First Amendment rights is inappropriate. *Robel* involved a federal statute that prohibited employees in designated defense plants from continuing to work once they had knowledge that an organization of which they were members had been designated as a "communist action" organization by the Subversive Activities Control Board. In holding the statute unconstitutional, the Court did not deny that protecting against sabotage in defense facilities was a proper government purpose; nor was the Court concerned with whether Congress could reasonably have found that Communists might use their positions to engage in sabotage. The Court was "concerned solely with determining whether the statute before us has exceeded the bounds imposed by the Constitution when First Amendment rights are at stake. The task of writing legislation which will stay within those bounds has been committed to Congress." *Id.* at 267. To the suggestion that the proper judicial technique was to balance the legitimate governmental interest against the threatened First Amendment rights, Chief Justice Warren responded:

> This we decline to do. We recognize that both interests are substantial, but we deem it inappropriate for this Court to label one as being more important or more substantial than the other. Our inquiry is more cir-

> cumscribed. Faced with a clear conflict between a federal statute enacted in the interests of national security and an individual's exercise of his First Amendment rights, we have confined our analysis to whether Congress has adopted a constitutional means in achieving its concededly legitimate legislative goal. In making this determination, we have found it necessary to measure the validity of the means adopted by Congress against both the goal it has sought to achieve and the specific prohibitions of the First Amendment. But we have in no way "balanced" those respective interests. We have ruled only that the Constitution requires that the conflict between congressional power and individual rights be accommodated by legislation drawn more narrowly to avoid the conflict. *Id.* at 268 n. 20.

Although on first glance there is a wide difference between the legislation involved in *Robel* and the investigative activities in Section 2511(3), on a closer look the difference is superficial. The legal objection to the *Robel* legislation was that it placed a substantial burden on the First Amendment protected activity of associating with a "communist action" organization. Membership in a "communist action" organization was not criminal, but anyone who so exercised his constitutional right was precluded from holding certain jobs. Viewed in this way the *Robel* legislation is similar to Section 2511(3), which imposes upon the constitutionally protected activity of association, the substantial burden that the government may monitor the member's unpopular activities for use as it sees fit. Moreover, this Court has recognized that governmental maintenance of records concerning advocates of unpopular ideas does have a deterrent impact on exercise of First

Amendment rights, and that governmental conduct which deters persons from exercising their rights does constitute an abridgement of those rights. *Lamont v. Postmaster General*, 381 U. S. 301, 307 (1964).

In view of this Court's declaration in *Robel* that it will not balance governmental interests against constitutional prohibitions, government may act only upon non-protected activities and is forbidden to employ prophylactic methods that control and regulate protected activity in order to promote otherwise legitimate purposes. Thus, if proposed governmental activity threatens to jeopardize associational rights, Congress must find narrower means to accomplish its goal.

Judicially unsupervised eavesdropping clearly has the potential to deter the protected right of association by placing persons in fear that this privacy will be invaded. It must therefore be more narrowly confined by a statute with built-in Fourth Amendment protection. The test is whether the statute or regulation is sufficiently clear on its face so that lawmaking power is not delegated by default to the investigator. See *Gregory v. Chicago*, 394 U. S. 111, 120 (1968) (Black, J., concurring). The investigator must be limited to electronic seizure of evidence of specific criminal conduct and denied the discretion to monitor unpopular groups randomly or in disregard of the First Amendment rights of those members pursuing lawful conduct.

II. Eavesdropping as Permitted by Section 2511(3) Is Not Sufficiently Circumscribed to Avoid Conflict With the First Amendment Right of Association.

Under Section 2511(3) the preliminary decision of the President or his delegate to initiate eavesdropping is exempt from the Fourth Amendment's mandate of judicial approval. Associations must therefore depend for protection

of their First Amendment rights on the self-imposed restraint of the eavesdropper or upon ultimate review by a trial court. At trial the courts must implement the section's vaguely defined standard of reasonableness. But trial will most often come too late to prevent the irreparable chilling effect on association. This Court has rejected the suggestion that the proper forum for vindication of rights is necessarily a criminal prosecution on the merits under the offending statute, on the ground that, if such were the case only the hardiest would dare exercise their rights. *Dombrowski v. Pfister*, 380 U. S. 479, 486-87 (1965). The statute neither authorizes nor forbids the blanket use of eavesdropping against associations thought to threaten national security. Moreover, the definition of acts dangerous to the national security is left substantially to executive discretion. The statute lacks standards to guide the investigator's conduct toward associations. Such lack of standards has been a determinative factor in many First Amendment cases involving association. See *United States v. Robel*, 389 U. S. 258, 275 (1967) (Brennan, J., concurring); *Dombrowski v. Pfister*, 380 U. S. 479, 494 (1965); *Baggett v. Bullitt*, 377 U. S. 360, 366 (1964). Hence, Section 2511(3) is offensive to the First Amendment because it is overbroad; it allows too great an intrusion on freedom of association. *United States v. Robel*, 389 U. S. 258, 259-61, 265 (1967); *Keyishian v. Board of Regents*, 385 U. S. 589, 602-10 (1957); *Elfbrandt v. Russel*, 384 U. S. 11, 12-19 (1966); *Aptheker v. Secretary of State*, 378 U. S. 500, 508 (1964); *Louisiana ex rel. Gremillion v. NAACP*, 366 U. S. 293, 296-97 (1961); *Shelton v. Tucker*, 364 U. S. 479, 488-90 (1960).

Only invalidation of the section can insure freedom of association the protection guaranteed by the First Amendment. It is not certain that the exclusionary rule would be available in a case not arising under the Fourth Amendment. Moreover, the exclusion would not neutralize

any "chilling effect" that had already occurred, because it is available only to those directly subject to the violation. *Alderman v. United States*, 394 U. S. 165, 171-72 (1969).

III. Freedom of Association Is Essential to the Formulation of Public Policy in a Democracy.

Public policy in a democracy is made by permitting and indeed encouraging the free play and clash of a variety of notions about what that policy should be. In this process organizations and associations of every conceivable type have an indispensable part. Increasingly, we hear the voices of people who have associated themselves in groups to advance a point of view by raising the funds necessary to spread that point of view through the media. A democracy can only impoverish and eventually destroy itself by creating an environment of fear and mistrust which stills these voices. As Justice Holmes said in dissent in *Abrams v. United States*, 250 U. S. 616 (1919) at page 630:

> ". . . when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with

the lawful and pressing purposes of the law that an immediate check is required to save the country."

We are met with the argument that no dire effect upon "free trade in ideas" may reasonably be anticipated from electronic surveillance limited to cases of "attempts of domestic organizations to attack and subvert the existing structure of government."

As it reviews the positions it has taken on a number of public policy questions over the years, *amicus* is not comforted by these words. Would it have been plainly unreasonable, for example (assuming some test of the reasonableness to have been afforded) to have conducted an investigation by wiretapping of an equal employment opportunities program in Baton Rouge in 1961? Would it have been clearly impermissible, under the Attorney General's criteria, to wiretap an organization which first advocated total and unilateral withdrawal of American troops from Vietnam in 1954? What about an organization which in 1965 announced its support of the admission of Red China into the United Nations? Or an organization which in 1970 published a comprehensive, and highly controversial, series of proposals to bring about lasting peace in the Middle East? Where do we find that clear line between the subversive and the unpopular which would, for example, have shielded *amicus* when, long before Attica, it was promoting prison reform, or when, well ahead of government espousal or popular acceptance, it spoke out in favor of legal aid to the poor and guaranteed minimum incomes?

Amicus makes no claims of significant impact on public policy in the United States. But if what it has tried to do is multiplied by the number of domestic organizations which have made similar efforts the significance is undeniable, as is the significance of inhibiting those organizations by introducing a climate in which they must watch their words, lest government listen in.

CONCLUSION.

Section 2511(3) of the Omnibus Crime Control and Safe Streets Act of 1968 invades the fundamental freedom of association which is guaranteed by the First Amendment of the Constitution because it is vague and overbroad. For the reasons outlined, this section of the law should be declared unconstitutional.

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